

STATE OF MICHIGAN
COURT OF APPEALS

PAGEANT HOMES, INC,

Plaintiff-Appellant/Cross-Appellee,

v

WILLIAM E. BRADLEY, WILLIAM WILFORD,
and PATRICIA WILFORD,

Defendants,

and

DEUTSCHE BANK NATIONAL TRUST,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

October 20, 2011

No. 293359

Ingham Circuit Court

LC No. 07-001867-CH

ON REMAND

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this suit involving an attempt to foreclose on real property, plaintiff Pageant Homes, Inc. appeals the trial court's order dismissing its claim against defendant Deutsche Bank National Trust and declaring that Deutsche Bank's handling of insurance proceeds did not implicate the Michigan Construction Lien Act (the Lien Act), see MCL 570.1101 *et seq.*, and that its mortgage on the property owned by defendants William and Patricia Wilford (the Wilfords) had priority over any lien that Pageant Homes might have had on the same property. On cross appeal, Deutsche Bank appeals the trial court's decision to deny its earlier motion for summary disposition. Because we conclude that the parties have not raised any claims of error warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

William and Patricia Wilford own the residential property at issue. In January 2003, the Wilfords obtained a loan for more than \$70,000, which was secured by a recorded mortgage. In April 2003, Deutsche Bank took an interest in the Wilfords' loan and mortgage as the trustee

under a pooling and servicing agreement. In December 2004, Deutsche Bank contracted with Litton Loan Servicing, LP to service the Wilfords' loan.

In July 2006, the Wilfords lost their home to a fire. The Wilfords hired William Bradley to rebuild their home and he contracted with Pageant Homes to supply materials for the project. Pageant Homes began to furnish supplies to the work site in November 2006 and continued to do so through February 2007. During this time, Pageant Homes did not file or record a claim of lien against the property.

William Wilford testified at his deposition that he became unhappy with Bradley's services and told him he was not to do any more work on the property in January or February 2007. He then hired another contractor to complete the home.

In March 2007, Pageant Homes sent a letter to the Wilfords noting that Bradley had agreed to purchase more than \$33,000 in materials for the reconstruction of their home and that the remaining balance of more than \$29,000 was now overdue. Pageant Homes also stated that it had already delivered all the materials except those materials for "the front porch/deck" and that it would deliver the last materials "at your request." The Wilfords responded by sending Pageant Homes a letter stating that Bradley was no longer working on the project. Despite having stated that it would deliver the remaining materials at the Wilfords' request, Pageant Homes elected to deliver a set of stair stringers to the property several months later—on July 20, 2007—and then filed a claim of lien against the Wilfords' property on August 14, 2007.

In July 2007, the Wilfords also entered into an agreement with Deutsche Bank to amend the 2003 note and mortgage to provide for a fixed interest rate.

Pageant Homes sued the Wilfords, Bradley, and Deutsche Bank in December 2007. Pageant Homes sued Bradley for the unpaid balance of the contract for construction materials. In the other count, Pageant Homes asked the court to declare that it had a valid construction lien against the Wilfords' property and that the lien was superior to that held by Deutsche Bank. It also asked the trial court to order the sale of the Wilfords' home to pay the lien.

In March 2008, the trial court entered a default against the Wilfords for failing to answer Pageant Homes' complaint. The Wilfords moved to set aside the default in August 2008, but the trial court denied the motion. At about the same time, William Wilford filed an affidavit of payment. In the affidavit, he averred that he and his wife paid Bradley \$17,440, which "represents the total work completed to be paid pursuant to the contract and all related agreements"

Deutsche Bank moved for summary disposition under MCR 2.116(C)(8) and (C)(10) in October 2010. In its motion, Deutsche Bank argued that Pageant Homes did not have an enforceable lien. Specifically, Deutsche Bank argued that, because Pageant Homes had been informed that Bradley was no longer the Wilfords' contractor, Pageant Homes' delivery of materials in July 2007 did not serve to restart the timeline for filing a construction lien. As such, the lien was untimely and invalid. Deutsche Bank also argued that the lien was invalid because the materials that Pageant Homes delivered in July 2007 were not used in the construction and because Bradley was not a licensed contractor.

The trial court determined that there were questions of fact as to whether Pageant Homes' lien was timely and valid. For that reason, it denied Deutsche Banks' motion for summary disposition in February 2009.

In March 2009, Deutsche Bank filed a motion that it labeled a "motion to discharge construction lien" under MCL 570.1203. In its motion, Deutsche Bank argued that, because William Wilford filed an affidavit of payment, Pageant Homes' construction lien did not attach under MCL 570.1203(1).¹ Accordingly, Deutsche Bank asked the trial court grant its motion and enter an order discharging Pageant Homes' construction lien.

The trial court held a hearing on the motion on March 31, 2009. At the hearing, Deutsche Banks' lawyer argued that William Wilford's affidavit of payment showed that he paid all that he owed to Bradley and, under MCL 570.1203(1), that was sufficient to preclude Pageant Homes from attaching a lien to the property. In response, Pageant Homes' lawyer argued that there was evidence that the Wilfords did not pay Bradley in full on the contract and, for that reason, MCL 570.1203(1) did not invalidate Pageant Homes' lien. He then went on to argue that Pageant Homes' lien had priority over Deutsche Banks' mortgage because Deutsche Banks' loan servicer, Litton, handled the Wilfords' insurance proceeds during the reconstruction. Specifically, he argued that, by exercising its right to control the insurance funds under the terms of the mortgage, Deutsche Bank effectively lost priority for its mortgage.

In response, Deutsche Banks' lawyer stated that Deutsche Banks' mortgage was plainly recorded in 2003 and that Litton's handling of the insurance proceeds was not at issue. This is because the insurance proceeds were not a disbursement under the terms of the note that was secured by the mortgage on the Wilfords' property and, in any event, Litton's handling of the insurance proceeds was not relevant to whether Pageant Homes' lien was valid under the construction lien act.

After these initial arguments, the trial court continued to discuss the priority of the parties' respective liens. Indeed, the trial court even had an employee from Litton sworn and took testimony regarding Litton's handling of the insurance proceeds. Deutsche Banks' lawyer, in apparent exasperation, reiterated her belief that the present motion concerned whether Pageant Homes had a lien to foreclose and did not concern the priority of its mortgage: "Sorry, Your Honor, I just keep beating a dead horse, but what Litton did or its procedures for disbursing insurance settlement proceeds have nothing to do with whether Pageant Homes is entitled to foreclose on its lien"

The trial court ended the discussion about priority on that note. It then determined that the disbursement of insurance proceeds did not fall under the construction lien act. It also stated that it was "going to grant [Deutsche Bank's] motion and the lien, Pageant's lien is going to be discharged from the property." The trial court also stated that it was going to permit Pageant Homes to "bring in the homeowner's recovery fund" and that, because the disbursed funds were

¹ The Legislature repealed MCL 570.1203, effective August 2010. See 2010 PA 147. However, it enacted a similar provision that is now codified at MCL 570.1118a(1).

insurance proceeds, “the bank has priority.” Finally, the court reminded Pageant Homes that it could still ask for a judgment against the defaulted parties.

In May 2009, Pageant Homes moved for entry of judgment against Bradley and the Wilfords for more than \$31,000. Pageant Homes also recognized that the trial court had stated on the record that it would dismiss Pageant Homes’ lien, but suggested that this statement was inconsistent with its earlier decision to deny summary disposition in favor of Deutsche Bank because there were questions of fact as to whether Pageant Homes’ lien was valid. It also noted that whether it had a valid lien was a separate question from the priority of its lien.

In response, Deutsche Bank stated that the court’s remarks about the discharge of Pageant Homes’ lien was irrelevant to whether it should enter judgment against Bradley and the Wilfords. Deutsche Bank nevertheless felt compelled to respond to Pageant Homes’ argument that the trial court had not meant to discharge the lien. Deutsche Bank noted that the court specifically stated that it would discharge the lien at oral arguments and provided that Deutsche Bank should be dismissed. These statements along with the trial court’s statement that it would permit Pageant Homes to “reopen” the case to add a party were clear indications that it had determined to discharge the lien and finalize the case. Finally, Deutsche Bank stated that it thought it was inappropriate for Pageant Homes to now seek damages against the Wilfords even though it had only pleaded a contract claim against Bradley.

On July 1, 2009, the trial court entered an order for default judgment against Bradley and the Wilfords, jointly and severally, for \$31,705.13.

The trial court also entered an order on July 13, 2009 in which it dismissed the “complaint” against Deutsche Bank with prejudice, declared that Deutsche Bank’s mortgage has priority over Pageant Homes’ “construction lien”, and that the Lien Act does not apply to the insurance proceeds disbursed by Litton. The court’s order also provided that Pageant Homes could “re-open the case” to add the Homeowner Construction Lien Recovery Fund as a party, but that this would not alter the dismissal as to Deutsche Bank.

Pageant Homes appealed by right the trial court’s order of July 13, 2009. On appeal, Pageant Homes argued that the trial court’s order was, in effect, the grant of summary disposition in favor of Deutsche Bank. Pageant Homes further stated that, in granting summary disposition in favor of Deutsche Bank, the trial court erred in two respects: it erred when it concluded that Deutsche Bank’s disbursement of insurance proceeds were not subject to Lien Act and it erred when it determined that Pageant Homes’ lien against the Wilfords’ property did not take priority over those advances. Pageant Homes cited MCL 570.1107 for the proposition that it had a lien. It then argued that, under MCL 570.1119, its lien had priority over an “advance” of funds that Deutsche Bank made after the first improvement to the property because such advances were not made after receiving a contractor’s sworn statement. On the basis of this argument, Pageant Homes asked this Court to do four things: reverse the trial court’s order dismissing the complaint against Deutsche Bank, hold that the insurance disbursements were subject to the construction lien act’s priority provisions, hold that Deutsche Bank’s mortgage lien does not have priority over the construction lien with respect to the “advance made on February 27, 2007” and the “advance made on July 3, 2007”, and remand this case for trial on the issue of whether the construction lien was timely.

In addition, Deutsche Bank cross-appealed the trial court's decision to earlier deny its motion for summary disposition. Deutsche Bank argued that the trial court erred when it determined that there was a question of fact as to whether Pageant Homes timely filed its construction lien and erred when it determined that there was a question of fact as to whether the material that Pageant Homes delivered in July 2007 was used to improve the home. In reply, Pageant Homes argued that whether it delivered the stair stringers in good faith was a question of fact and that the time period within which to file a construction lien did not depend on whether or when the materials were used to improve the property, but rather depended solely on the date that Pageant Homes furnished the materials.

On appeal, this Court noted that, although the trial court's orders could have been more clearly stated, it was "evident" from the entire record that the trial court granted Deutsche Bank's motion to discharge Pageant Homes' lien and that it must have done so under MCL 570.1203(1).² See *Pageant Homes, Inc v Bradley*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2011 (Docket No. 293359). We also stated that Pageant Homes had not "challenged the trial court's decision in this regard"; rather, it limited its claim of error to whether the trial court properly determined that Deutsche Bank's mortgage had priority over Pageant Homes' construction lien. *Id.* We explained that, given the trial court's dismissal of the foreclosure claim, whether Pageant Homes' construction lien had priority over Deutsche Bank's mortgage was a purely hypothetical question. For that reason, we refused to address that question. *Id.* In addition, because of our resolution of that issue, we declined to address Deutsche Bank's cross-appeal as moot. *Id.*

Pageant Homes then appealed to our Supreme Court. Our Supreme Court determined that this Court erred when it determined that Pageant Homes had not properly raised a claim regarding the discharge of its lien. Specifically, it determined that the "record below reflects that plaintiff Pageant Homes, Inc.'s argument on appeal encompassed the issue of whether its lien was discharged because an affidavit of payment was filed under MCL 570.1203(1)." *Pageant Homes, Inc v Bradley*, 489 Mich 981 (2011). It then remanded this case for "consideration of the issues raised by the parties but not addressed" by this Court." *Id.*

² Had the trial court determined that Pageant Homes had a valid and enforceable lien—albeit a junior lien—it would still have had to resolve whether Pageant Homes could foreclose against the Wilfords' home. But the trial court did not order a foreclosure sale; it dismissed Deutsche Bank—a necessary party to any foreclosure proceeding—from the suit and resolved the case by entering a monetary judgment against Bradley and the Wilfords. And it did so on Deutsche Bank's motion to "discharge" Pageant Homes' lien. Accordingly, the trial court must have determined that Pageant Homes did not have an enforceable lien.

II. DEUTSCHE BANK’S CROSS-APPEAL

A. STANDARDS OF REVIEW

We shall first address Deutsche Bank’s cross-appeal. In its cross-appeal, Deutsche Bank argues that the trial court should have dismissed Pageant Homes’ claim for lien foreclosure under MCR 2.116(C)(8) and (C)(10). This Court reviews de novo whether a trial court’s decision to deny a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

In its motion for summary disposition, Deutsche Bank argued that the trial court should dismiss Pageant Homes’ claim for foreclosure on the grounds that Pageant Homes failed to state a claim under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the allegations of the pleadings alone. *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). The motion should be granted “if no factual development could possibly justify recovery.” *Id.*

Under the Lien Act, “[e]ach contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property” MCL 570.1107(1). In this case, Pageant Homes pleaded that the Wilfords contracted for an improvement to their real property with Bradley and that it supplied Bradley with materials that were used in an improvement to the Wilfords’ home. Pageant Homes also pleaded that it filed a construction lien in August 2007 and that its filing was within 90 days of the date that it last furnished material under the contract. Pageant Homes adequately pleaded a claim that it had a valid and enforceable construction lien under MCL 570.1107 and that it could seek the equitable remedy of foreclosure under that lien. See MCL 570.1118 (providing that a lien holder may bring an equitable foreclosure action in the Circuit Court in order to enforce its lien). Consequently, the trial court did not err when it refused to dismiss Pageant Homes’ claim for foreclosure of its lien under MCR 2.116(C)(8).

Deutsche Bank also argues that the trial court erred when it refused to dismiss Pageant Homes’ foreclosure claim under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A party may be entitled to summary disposition of a claim under MCR 2.116(C)(10), if “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact”

In its motion for summary disposition, Deutsche Bank maintained that Pageant Homes’ lien was untimely under MCL 570.1111(1) because Pageant Homes did not file its claim of lien until more than 90 days after it last furnished “material for the improvement.” Deutsche Bank presented evidence that William Wilford had notified Pageant Homes that Bradley was no longer working on the improvement project as of March 2007 and that Pageant Homes had specifically stated that it would not supply any additional materials except upon request. On the basis of this evidence, Deutsche Bank argued that Pageant Homes’ delivery of the stair stringers in July 2007 could not serve as the “last furnishing of labor or material for the improvement” for purposes of MCL 570.1111(1). Rather, the date provided under MCL 570.1111(1) began to run from the

delivery that Pageant Homes last made in February 2007. Because Pageant Homes did not file its claim of lien until August 2007, Deutsche Bank concluded that Pageant Homes' claim of lien was untimely and invalid as a matter of law.

The Lien Act provides that a supplier is entitled to file a lien against real property under certain circumstances. See MCL 570.1107. However, a supplier loses this right if it does not file a timely claim of lien against the property. See MCL 570.1111(1). Specifically, the Legislature required the supplier to file its claim of lien within 90 days of the claimant's "last furnishing of labor or material for the improvement." *Id.* By stating that the period begins as of the last furnishing of labor or materials done *for the improvement*, the Legislature plainly provided that not every act of furnishing labor or materials will extend the period within which to file a claim of lien. That is, the purpose of the supplier's act in furnishing materials is relevant to determining whether the act extended the period within which to file a claim of lien. Accordingly, if Pageant Homes delivered the stair stringers—despite the termination of its relationship with the Wilfords—for the purpose of preventing the lapse of its right to a construction lien, that delivery would not be a delivery of "material for the improvement" within the meaning of MCL 570.1111(1). Once Deutsche Bank presented evidence that tended to show that Pageant Homes' July 2007 delivery was done in a bad faith attempt to prevent the lapse of its right to a construction lien, Pageant Homes had to demonstrate that there was a question of fact on that issue. See *Barnard Mfg*, 285 Mich App at 374.

In response to Deutsche Bank's motion, Pageant Homes presented evidence that the stair stringers were custom made for the Wilfords' home in late February 2007—that is, before it had any notice of problems between the Wilfords and Bradley. It also presented evidence that its employee continued to negotiate with William Wilford about its agreement to furnish the materials for the improvement project after William had informed Pageant Homes of the change in contractors and that it delivered the stair stringers in order to complete performance under its contract. Given this evidence, a reasonable finder of fact could find that Pageant Homes made the delivery in good faith. But a reasonable finder of fact could also find that Pageant Homes delivered the stair stringers in order to preserve its right to a construction lien rather than for the improvement project. Accordingly, there was a question of fact as to whether Pageant Homes last furnished "material for the improvement", within the meaning of MCL 570.1111(1), in July 2007 or February 2007.

Deutsche Bank also argues on appeal that the trial court erred when it concluded that there was a question of fact as to the timeliness of Pageant Homes' claim of lien because, even assuming that Pageant Homes made the July 2007 delivery in good faith, there is no evidence that the Wilfords' contractor used the stair stringers to improve the property. As such, that delivery could not serve as the last date of "furnishing labor or materials for the improvement." See MCL 570.1111(1). That is, Deutsche Bank argues that a delivery of materials does not constitute the "furnishing . . . of material for the improvement" unless those materials are actually used to improve the property. *Id.*

In support of its argument, Deutsche Bank places a great deal of reliance on the definition of improvement found under MCL 570.1104(5) and the definition of actual improvement found under MCL 570.1103(1). However, MCL 570.1111(1) does not provide the qualifications that must be met before the right to a lien attaches, it provides the period after which a right that already has attached lapses unless the lien claimant takes steps to protect his or her right.³ And MCL 570.1111(1) does not provide that the period begins to run from the point when a supplier last furnished materials *used* in the improvement; it provides that the period begins to run from the last *furnishing* of material *for* the improvement. The use of the term “for” in this context refers to the purpose behind the furnishing of the labor or material and not the actual result. Thus, as long as Pageant Homes had the right to a lien under MCL 570.1107 prior to furnishing the stair stringers and then furnished the stair stringers in July 2007 “for the improvement”, it does not matter that the stair stringers were not actually used to improve the property—it would still have 90 days from that delivery to take steps to protect its lien.

Because there was a question of fact as to whether Pageant Homes last furnished material for the improvement in February or July 2007, the trial court properly denied Deutsche Bank’s motion for summary disposition under MCR 2.116(C)(10).

III. THE PRIORITY OF ANY LIEN THAT PAGEANT HOMES MIGHT HAVE HAD

A. STANDARD OF REVIEW

We shall next address Pageant Homes’ claim that the trial court erred when it determined that the Lien Act did not apply to Deutsche Bank’s disbursement of insurance proceeds and erred when it determined that Deutsche Bank’s disbursement of insurance proceeds had priority over its construction lien. This Court reviews *de novo* the proper application and interpretation of statutes. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

B. PRIORITY OVER MORTGAGE ADVANCES

On appeal, Pageant Homes argues that the trial court erred when it determined that MCL 570.1119(4) did not apply to Deutsche Bank’s disbursements of insurance proceeds and further erred when it determined that Pageant Homes’ lien did not have priority over Deutsche Bank’s disbursements. Specifically, Pageant Homes argues that, because Deutsche Bank disbursed the insurance proceeds without first obtaining a contractor’s sworn statement, to the extent that Deutsche Bank made disbursements after the date of the first actual physical improvement to the Wilfords’ home, those disbursements did not have priority over Pageant Homes’ construction lien under MCL 570.1119(4).

³ The qualifications necessary to establish the right are found under MCL 570.1107. In this case, it is apparently undisputed that some of Pageant Homes’ materials were used in the improvement of the Wilfords’ home, which would trigger the right to a lien. *Id.*

The Lien Act provides that a construction lien “shall take priority over all other interests, liens, or encumbrances which may attach to . . . the real property . . . when the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement.” MCL 570.1119(3). However, a mortgage “recorded before the first actual physical improvement to real property shall have priority over a construction lien arising under this act.” MCL 570.1119(4).

Here, the undisputed evidence shows that the Deutsche Bank held a note from the Wilfords that was secured by a mortgage and that Deutsche Bank recorded the mortgage in 2003. It was also undisputed that the first actual improvement to the Wilfords’ property did not occur until November or December 2006. Consequently, under the plain language of MCL 570.1119(4), Deutsche Bank’s mortgage had priority over any construction lien arising from the improvements at issue “as to all obligations secured by the mortgage except for indebtedness arising out of advances made subsequent to the first actual physical improvement.” Because the original disbursement under the note occurred—at the latest—in 2003, Deutsche Bank’s mortgage clearly had priority over any construction lien to the extent that it secured the 2003 debt.

Moreover, the remaining provisions of MCL 570.1119(4) delineate the circumstances under which a mortgagee can secure priority for an “indebtedness arising out of advances” made subsequent to the first actual improvement: the mortgagee of a prior recorded mortgage will obtain priority for its advances secured by the mortgage if it has “received a contractor’s sworn statement . . . , has made disbursements pursuant to the contractor’s sworn statement, and has received waivers of lien from the contractor and all subcontractors, laborers, and suppliers who have provided notices of furnishing.” *Id.* It is obvious that the advances must give rise to indebtedness before the mortgagee will need to take steps to protect its priority; where the advances do not give rise to any new indebtedness, there is nothing to protect. It is also equally clear that nothing within MCL 570.1119(4) alters the priority applicable to a preexisting mortgage that secures a preexisting indebtedness; it merely provides that an indebtedness that arises out of a later advance will not have priority under the preexisting mortgage if the advance occurs after the first actual improvement to the property and the mortgagee fails to take the required steps to protect its priority as to that advance.

It is undisputed that Deutsche Bank made disbursements through its servicing agent to cover the costs of replacing the Wilfords’ home. But it is also undisputed that those disbursements were from insurance proceeds and did not give rise to any new indebtedness under the Wilfords’ note and mortgage. Consequently, the trial court did not err when it determined that MCL 570.1119(4) did not apply to the disbursement of the insurance proceeds and did not err when it determined that, were Pageant Homes able to establish a valid construction lien after a trial, Deutsche Bank’s mortgage would have priority to the extent that it secured the debt the Wilfords’ originally incurred in 2003.

III. CONCLUSION

The trial court did not err when it determined that there were questions of fact as to whether Pageant Homes timely filed its claim of lien. As such, it did not err when it denied Deutsche Bank's motion to dismiss Pageant Homes' foreclosure claim on that basis. The trial court also did not err when it determined that the insurance proceeds disbursed by Deutsche Bank were not advances giving rise to indebtedness within the meaning of MCL 570.1119(4). Finally, the trial court did not err to the extent that it determined that, were Pageant Homes able to establish that it had a valid and enforceable construction lien against the Wilfords' property, that lien would be subordinate to Deutsche Bank's 2003 mortgage.

For these reasons, we affirm the trial court's February 2008 order denying Deutsche Bank's motion for summary disposition and affirm the trial court's July 13, 2009 order dismissing the complaint against Deutsche Bank and resolving the parties' priority dispute.

Affirmed. None of the parties having prevailed in full, none may tax costs. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause